THE PROBLEM OF ADEQUATE LEGISLATIVE POWERS UNDER STATE CONSTITUTIONS

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IN addition to the many specific questions that agitate a constitutional convention, there must always be in the background the general problem how to construct the entire framework of the instrument in such manner that it may best serve as the paramount law of the state. The situation confronting the convention in this respect may be briefly stated as follows.

State constitutions have grown vastly in bulk, and the increase is shared equally by the provisions relating to organization and those relating to governmental policy and action. With regard to the former it has been chiefly an elaboration of detail, with regard to the latter an enlargement by the introduction of new constitutional aims and functions. In the old constitution, stress was laid on governmental inaction; in the new it is on positive policies and measures.

Distrust of all public power was the keynote of the bill of rights; distrust of the legislature and dissatisfaction with its past performances the mainspring of many, if not most, of the subsequent limitations and prohibitions.

At the same time, in an increasing degree, the constitution was made the means of giving the most direct and forcible expression to the popular will. The desire to make a temporarily dominant policy secure against reversal by shifting political majorities was sometimes a factor in this development, but not the only one, for policies were expressed in constitutional clauses which had become fixed principles of legislation, removed from the strife of partisan politics, as the standing provisions relating to banks and railroads show. There was little danger that in these matters the legislature would thwart the will of the people, and as a matter of fact legislation readily

and effectually supported and carried out the constitutional policies.

In the course of time the habit of giving constitutional expression to the popular will produced inconveniences which could hardly have been foreseen at the beginning in their entirety. If the object of the constitution were merely to curb and check legislation, the piling-up of constitutional provisions would serve the purpose admirably. There are some purely prohibitive and negative clauses which thus fulfil their function and operate without trouble or difficulty.

It is otherwise where the constitutional provision is not self-executing. The clauses controlling legislative procedure require of course legislative application; so do all enabling and directing provisions; the articles organizing the departments of government are rarely complete without supplementary legislation; and even restrictive clauses are often only imperfectly effectual without administrative statutes to enforce them. It is often said that the modern constitution usurps the function of a statute; but the truth is that the most prolix constitution is, as a piece of legislation, fragmentary and dependent. No method has yet been discovered, or is likely to be discovered, which will make it possible to dispense with statutory legislation as the only adequate channel of expressing the popular will.

From this arises a new problem: the constitution requires statutory regulation; yet the constitutional status of the matter to be regulated withdraws it from the fulness of legislative power in respects unforeseeable by the most careful framer of the provision. Almost every word of the constitution, though it purport to be enabling, is apt to operate in some way as a limitation upon legislative action. The statute is subordinate to the constitution, and the courts annul the statute which is not in accord with the paramount law.

Constitutional supremacy is meant to be the domination of the legislature by the people; in effect it must mean the domination of the legislature by the courts. While it is true that the court applies only the checks which it finds in the constitution, it is also true that it is the court that finds the checks.

In making a constitution, the people, so far from speaking directly, interpose between themselves and their will two organs instead of one.

It must be doubted whether the situation is fully realized. The movement for the recall of judicial decisions is directed only against the possible misinterpretation of the most general clauses of the constitution, in applying which the judiciary is as likely to be the guardian of right and justice as to be the thwarter of the popular will. It does not touch the numerous cases in which the popular will is defeated by a strict construction of specific clauses. The bitter hostility with which the recall of decisions is opposed and the slight headway which the movement has made, also show that the people are reluctant to risk so radical and imperfectly thought out an experiment with a fundamental feature of our institutions.

Yet since a purely negative attitude toward a widespread political demand is generally futile, it behooves us to inquire whether the present relation between constitution and legislation is not capable of readjustment so as to remove conceded shortcomings and grievances.

What is needed is some *modus vivendi* between the various constitutional organs, a plan that will establish constitutional supremacy without defeating the popular will through constitutional technicalities, that will check the abuse and careless use of legislative power without destroying its fullest liberty for useful and adequate service, that will preserve the benefit of judicial control without reducing constitutional principles to the plane of statutory rules: that will, in other words, set the various organs free to perform their functions beneficially and not obstructively, and preserve the essence of constitutional checks without hampering the work of legislation by unessential and unintended accidents.

This result can be accomplished if a constitutional convention can be induced to do the following things:

1. Qualify or remove limitations that experience has proved to be of slight value or unenforceable.

2. Attempt to secure superior methods of preparing and enacting legislation.

3. Minimize the effect of limitations that are due to inadvertence and not to deliberate policy.

4. Emancipate the legislature from supposedly inherent restraints placed upon it by a judicial theory of the exclusiveness, the inalienability and the non-delegability of constitutional powers.

PROCESS OF LEGISLATION

1. *The Share of the Executive in Legislation*

It is one of the characteristic features of American legislation that the multiform structure of the legislature is in nowise utilized for functional differentiation. In most European systems the two chambers represent different political elements of the state, and the executive has practically the monopoly of initiating measures. The government is thus a petitioner, parliament a critic and the final judge. The reciprocal interaction of different organs of the body politic creates all around a hightened sense of responsibility for legislation.

There is no prospect of forcing by constitutional enactment a change of so delicate a nature as a transformation of the constitutional relations between the organs of legislation; such a change can be only a matter of slow and spontaneous growth. But it may not be impossible to invite reforms which look in the direction of a better utilization of the share of the executive in legislation, since his coöperation is already provided for, and the clear tendency of the time is to make him a more powerful factor in shaping both legislative policies and specific measures.

Three relatively simple changes are suggested for this purpose:

(1) Let the constitution give the governor the right to introduce bills. He can now readily find members to bring in bills known to emanate from him and spoken of as administration bills; they have been officially recognized as such by house rules;[1] but their status would gain if the governor could appear formally as their sponsor. The practice would not

[1] See as to Illinois a note in *American Political Science Review,* vol. vii, p. 239.

be revolutionary, since it is only a slight step beyond the existing power to recommend by message; and it would not be necessary to give governor's bills a preferred status. For a precedent reference may be made to the constitution of Alabama, which provides (art. 4 sec. 70) that the governor, auditor and attorney general shall before each regular session of the legislature prepare a general revenue bill, to be submitted to the legislature for its information, to be used or dealt with by the house of representatives as it may elect.

(2) In signing bills the governor frequently exercises a scrutiny of a technical character, discovering and pointing out legal and administrative defects. The merit of such criticism is rarely questioned. In some states the opportunity for it is unduly restrained by the short time allowed the governor for his action. What counts particularly is the time after adjournment, when the number of bills submitted simultaneously is greatest. In some states, however, he has thirty days, in others until the next meeting of the legislature, or practically unlimited time. These provisions ought to be made general.

(3) In close connection with the last suggestion, the constitution should facilitate a speedy method of accepting suggestions for amendment made by the governor. At present there is only the alternative of supporting the veto or overriding it, of passing an imperfect bill or dropping it and starting the process of enactment *de novo*. There should be a constitutional provision permitting the bill as amended in accordance with the governor's suggestions to be put to the vote of the houses. Such a provision exists in Alabama (art. v sec. 125), and also with regard to ordinances in Chicago (Act of 1905). A constitutional provision to this effect would probably encounter no opposition. It is almost a necessary counterpart to another provision sometimes advocated, which however has been adopted only in Washington, namely, that the governor may veto one particular section of a bill. The Alabama provision, indeed, makes the latter provision superfluous.

2. *Procedural Requirements*

Practically every constitution gives to each house the power to determine its own rules of proceeding. This autonomy is of course subject to specific constitutional requirements. The constitution of the older type is very sparing in imposing such requirements, taking over the few provisions of the federal constitution, which, being directory in their nature, cannot affect the validity of legislation. Nothing illustrates so strikingly the demoralization of American legislative bodies and the slight esteem in which they were held by the people, as the practice of transforming rules into constitutional restraints. A rule may be salutary as such, and vicious as an absolute requirement. If a body cannot be relied upon to frame proper rules or to respect them when adopted, there is something fundamentally wrong. The presumption is against the wisdom of the unyielding restraint or requirement. Constitutional conventions should therefore carefully revise these procedural provisions, which are too often adopted simply because they are found in other constitutions.

The following are the most common or the most conspicuous of the procedural requirements:

That bills shall be read three times; first found in North Carolina, 1776; qualified so that readings must be on separate days (first, South Carolina, 1780), or in addition so that reading shall be at large or at length (so in Illinois).

That bills shall be referred to committees and be reported by them. Note the particular requirements in Mississippi that committees shall report on sufficiency of title, or on the reasons for resorting to a special or local act instead of enacting general legislation.

That bills shall not be introduced after a stated period.

That rejected measures shall not be reintroduced at the same session; that a motion to reconsider shall not be entertained on the day of the passing of the motion.

That bills shall not be amended so as to alter the subject matter thereof.

That bills and all amendments shall be printed.

That bills shall be on the desks of members in their final form three days before their passage.

That the majority of all the members is required for the passage of a bill; that the vote must be by yeas and nays and entered on the journal.

That the signature of the presiding officer be affixed in open session under suspension of business.

Some of these provisions are salutary, and their fulfilment can be very readily verified, so particularly the one regarding the final vote. Others on the other hand are quite impracticable; *e. g.*, that a bill be read at large three times. In the case of long bills this must be ignored, and the clerk will simply read the first and last few words; and the necessary fraud will be covered up by a false entry on the journal. Some can be reduced to unmeaning and perfunctory forms, so that really nothing is gained by the requirement; *e. g.*, the Mississippi provisions above referred to, or the recitals indicating an emergency. Some give rise to difficult questions of construction; as, *e. g.*, whether an amendment alters the subject matter of the bill, or still more, whether it alters it substantially.

The sound policy of constitution making is to impose procedural requirements only under the following conditions: (1) that they serve an object of vital importance; (2) that they can be complied with without unduly impeding business; (3) that they are not susceptible of evasion by purely formal compliance or by false journal entries; (4) that they do not raise difficult questions of construction; (5) that the fact of compliance or non-compliance can be readily ascertained by an inspection of the journal. The application of these tests would lead to the discarding of most of the existing provisions, without any detriment to legislation, as is proved by the experience of the states which never adopted them. As to those retained, the judicial power to enforce compliance should be limited in accordance with the recommendations which will be set forth in connection with the provisions of the class next to be discussed.

3. *Formal or Style Requirements*

In addition to prescribing an enacting clause, the constitutions deal with title and unity of subject matter, and with amendatory acts, very exceptionally also with referential legislation. The provision concerning the title of acts is usually coupled with the other provision that the act shall not embrace more than one subject. The clause may be traced back to the instructions issued by the Lords of Trade to Governor Tryon on February 17, 1771, which said:

> You are also as much as possible to observe in the passing of all laws that whatever may be requisite upon each different matter be accordingly provided for by a different law without intermixing in one and the same act such things as have no proper relation to each other; and you are more specially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports, *etc.*

In the state constitutions the provision regarding title seems to appear first in the constitution of Georgia of 1798: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof" (art. 1 sec. 17). The conjunction of the requirement of title with that of unity of subject matter appears for the first time in the constitution of New Jersey of 1844 (iv, 7, 4): "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title." Such a provision is found now in about two-thirds of the state constitutions.

In Illinois in 1848 it was confined to special and local acts and in New York it is so restricted (private or local laws) at the present time. The provision was introduced in New York in 1846. The constitutional convention of 1867 made the provision general but the constitution proposed by it was rejected by the people. The constitutional commission in 1872 again proposed the extension of the provision to all acts, but the proposition was at that time stricken out by the legislature and no change has since been made in New York.

The provision forbidding amendments of statutes by mere reference to title, but requiring the section as amended to be reënacted, appears first about the middle of the nineteenth century. (Louisiana, 1845, seems to be the first.) In 1835 it is to be found in no constitution. It is at present to be found in about twenty state constitutions.

It was proposed for New York by the constitutional convention of 1867 but failed by the rejection of the proposed constitution by the people. The constitutional commission of New York of 1872 substituted for this provision another section to the effect that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act (art. iii sec. 16). A similar provision is found in New Jersey but in no other state. It appears from Lincoln's *Constitutional History of New York*, vol. ii, p. 494, that the section was agreed to by the constitutional commission of 1872 without a division and apparently without debate and that it was approved by the legislature and adopted with another amendment in 1874. The provision has remained without practical significance in New York, the court of appeals having sustained every law which was questioned on the ground of the violation of the section.

Literally construed, it is clear that the section would make all referential legislation impossible. This could not have been the intent of the framers, and we are left to guess what they did mean. There is hardly a provision to be found in any American state constitution which so strikingly illustrates the thoughtlessness with which clauses are adopted, and, once adopted, are perpetuated in successive constitutions.

The requirements regarding title and subject matter undoubtedly inculcate a sound legislative practice, and in the great majority of cases amendment by reënacting a section is preferable to amending words or passages torn from their context. If the requirement to amend in the form of reënacting sections were generally construed, as it has been in Illinois and Nebraska, as forbidding or throwing doubt on supplemental acts

altering the effect of existing sections, its inconvenience would be much greater than its benefit; but the Illinois and Nebraska decisions are anomalous and indefensible.[1]

Conceding that these style requirements have had on the whole a beneficial effect upon legislative practice and the clearness of statutes, they have a reverse side which must not be ignored. They have given rise to an enormous amount of litigation, they have led to the nullification of beneficial statutes, they embarrass draftsmen, and through an excess of caution they induce undesirable practices especially in the prolixity of titles, the latter again multiplying the risks of defect. While the courts lean to a liberal construction, they have in a minority of cases been indefensibly and even preposterously technical, and it is that minority which produces doubt, litigation, and undesirable cumbrousness to avoid doubt and litigation.

The requirements were introduced to protect legislatures from fraud or surprise, and to stop the practice of log-rolling. The experience of those states which have not adopted the provisions would probably show that they are less necessary now than seventy-five years ago, that better practices have been compelled by public opinion, and that the benefits of the improvement may be enjoyed without the attendant risks and evils. Whether these considerations are sufficient to induce a constitutional convention to discard the provisions, is another question.

If, however, these provisions are retained, another reform is suggested, which should also be applied to all procedural requirements concerning legislation. The suggestion is that the validity of a statute shall not be allowed to be be questioned by reason of the alleged violation of any of these provisions in any action commenced later than a brief stated period either after the expiration of the session of the legislature or after the act has taken affect. Since an ordinary legitimate cause of action may not arise within the prescribed period, the pro-

[1] See an article on Supplemental Acts by the present writer, in *Illinois Law Review*, v. viii, p. 507.

vision might well be accompanied by another provision to the effect that such a statute may be impeached in a direct proceeding brought for that purpose by any citizen or any other party affected by the act (conceivably not a citizen), the attorney general being notified and having a right to intervene. The permission of a direct proceeding would merely regularize the rapidly growing practice of instituting suits for *quo warranto* or injunction against officials charged with administering an act, for the mere purpose of testing its validity.

Even more beneficial might be a provision to the effect that no statute should be questioned in any event by reason of the alleged violation in specific respects of a formal requirement where prior to its approval the attorney general had given his written opinion to the effect that its form or the procedure of its enactment did not in those specific respects violate the constitutional requirements.

The dangers against which the constitution desires to guard in formal and procedural requirements are necessarily of a transitory or ephemeral nature, which by the lapse of time become substanceless. If interests are prejudiced by precipitate haste, surprise, or log-rolling, a reasonable chance is given them to attack the law. After that chance has been given and no one has availed himself of it, the violated constitutional provision becomes merely a technical loophole of escape from the law, and the constitution makes it possible, not to protect legitimate interests, but to defeat the legislative will.

Constitutional Provisions to Improve the Quality of Legislation

Several readings, reference to committees and requirement of committee reports, concurrence of another house and executive approval,—all these are intended to make for more careful deliberation; all style requirements make for greater perspicuity and for better information of legislators; the provisions for the final vote for greater responsibility of the individual legislator. All these may be presumed to have had some effect and yet the technical quality of our legislation is inferior to that of Great Britain or Germany, in which no similar constitutional rules exist. Thus very forcibly the fact

is brought home to our minds that the effect of mechanical devices is limited and that it is a mistake to multiply mandatory rules to bring about what can be achieved only by sound tradition and by voluntarily accepted restraint and influence.

Clearly the organic nature of a large and distinctly political body is not conducive to high standards of workmanship. Sound and careful legislation is professional work, and diffused responsibility, a main characteristic of American legislatures, prevents criticism without which professional excellence is impossible. If European statutes are better made, it is because they emanate from the administration, and it is a well-known fact that in America statutes prepared by commissions are superior in form to those introduced from the body of the legislature.

In a few states the need of professional assistance has long been recognized, and in a rapidly increasing number of states provision has been or is being made for the organization of a drafting service in connection with legislative reference bureaus. So far as can be done without unduly hampering the freedom of legislative action, the constitution should strengthen this movement and should afford every facility for technical aid and intelligent criticism.

(1) If a drafting service is to be successful, a staff of expert men must be trained for the work. This means security of tenure in the service. Under our present constitutions it is impossible to give such tenure. The drafting officials should be part of the legislative staff, in order to win the full confidence of the houses; so long, however, as each house of the legislature has the constitutional right to choose its own officers, no statute can impair the right of each new house to make new selections.

The constitution should therefore provide that the right to choose officers shall be subject to any legislation enacted to regulate legislative official and clerical services. In no other way can civil service principles be made applicable to the staff of the legislature. (The value of such a provision would of course extend far beyond the improvement of the quality of the drafting service).

(2) While it may be unwise to attempt to curtail freedom of action in the interest of a more perfect legislative product, the constitution might well at least secure opportunity for expert information and criticism. This purpose would be accomplished by a provision to the effect that on the demand of the governor or of the presiding officer of either house, or of a stated proportion of members, a bill shall be referred for opinion and suggestion to any designated official bureau or commission; upon its being so referred action to be postponed for not exceeding a specified period; the legislature to be free to accept or reject any suggested alteration. The members would thus be in a position to judge between the merits of two alternative propositions, one of which would represent the best readily available expert knowledge. If the period fixed for the delay is reasonably brief, the danger that demands for reference may be made for the mere purpose of hindering action, would not be serious; emergencies would have to be provided for, but only under effective safeguards; as, *e. g.*, a special message of the governor, declaring the urgent necessity for the immediate passage of the bill.

RESULTING LIMITATIONS

Resulting limitations are the consequence of positive constitutional provisions not intended primarily as restraints or checks upon legislation, provisions sometimes imperfectly operative without further legislation, and sometimes even enabling and directory in their character. They should be distinguished from other unexpressed limitations which are regarded as inherent in the nature of some constitutional power.

To illustrate: If the constitution says the Supreme Court shall have original jurisdiction in certain classes of cases, and it is inferred that the legislature can confer no additional original jurisdiction, this is a resulting limitation. If it is held that the power of taxation can be exercised only for public purposes, that is an inherent limitation. A resulting limitation is a matter of constitutional construction, an inherent limitation a matter of constitutional theory.

Very often the doctrine of resulting limitations means that

an implied power is treated as independent and exclusive, curtailing, if the implied power is executive or judicial, the normal functions of the legislature. Whether the implied power carries with it necessarily a resulting limitation is an open question. The first Congress in organizing the Department of State rejected a provision making the Secretary in terms removable by the President, preferring to treat the executive power of removal as an implied power. In 1867, Congress, in passing the Tenure of Office Acts, treated this implied power as one subject to legislation. These acts were subsquently repealed, and their validity has never been passed upon by the Supreme Court, but there is quite recent legislation making officials removable for specified causes only.[1] If this legislation is valid, it illustrates the existence of an implied power without a resulting limitation.

The doctrine of resulting limitations is co-equal with the final establishment of the judicial power to declare laws unconstitutional, for it was applied in Marbury *v.* Madison (1 Cranch 137, 1803), to a statute undertaking to vest the Supreme Court with original jurisdiction other than that specified in the constitution. While the decision itself has never been questioned, it is a fact of some significance that its entire reasoning has been calmly ignored in dealing with the converse proposition of vesting in inferior courts concurrent original jurisdiction over matters assigned by the constitution to the Supreme Court.[2] Chief Justice Marshall certainly regarded both propositions in the same light, for he distinctly stated (p. 174) that Congress could not give the Supreme Court appellate jurisdiction where the constitution had declared that its jurisdiction shall be original. It should also be borne in mind that the legislation declared unconstitutional was framed and enacted by a Congress as thoroughly familiar with the spirit and intent of the constitution as the judges of the Supreme Court, and no doubt occurred to them concerning its validity.

[1] See Shurtleff *v.* U. S., 189 U. S. 311, and the subsequent Tariff Acts of 1909 and 1913 as to tenure of general appraisers.

[2] Willoughby, *Constitutional Law*, § 1557.

The difficulties in dealing with the question of resulting limitations are well illustrated by a recent decision of the supreme court of Illinois (People *ex rel.* Gullett *v.* McCullough, 254 Ill. 1, 1912). A civil service act of the usual type was enacted in 1911, to apply to the subordinate places in the various departments of the state government. The validity of the law was contested by several clerks in the office of the secretary of state assigned to the performance of statutory functions. The contention was that since the secretary of state was a constitutional officer, his power to appoint necessary subordinates could not be controlled by legislation otherwise than through the constitutional power of appropriating necessary funds. The court by a bare majority decided the case against the contestants. The principal opinion took the ground that the fact that an office was constitutional did not destroy the general legislative power to regulate the details of its organization and the tenure of the subordinate officials. One judge specially concurred on the ground that the particular duties assigned to the officials who attacked the statute were statutory, but conceded that the secretary of state cannot be controlled by legislation in the appointment of subordinates whom he needs to perform functions which belong to the ordinary province of a secretary of state. The dissenting judges denied, *in toto,* the power of the legislature to regulate the appointment of subordinates of a constitutional officer. The opinions rendered thus represent the three attitudes toward the problem of resulting limitations: the view in favor of a full legislative power of regulation in matters not expressly regulated by the constitution; the opposite view that constitutional status excludes legislative regulation; and the middle view that constitutional recognition implies at least some degree of independence as against the legislature; which must be determined from case to case.

Only a minority of the supreme court of Illinois in the case referred to take the first view, recognizing a general legislative power to place a constitutional office under civil service rules, where the constitution is silent as to the organization of the office beyond a bare mention of it. It would be difficult

to say which of the three views represents the prevailing American doctrine. Generally speaking, however, the question is sufficiently close to furnish a ready pretext for the refusal to enact such legislation on the plea of lack of constitutional power.

The lack of legislative power would be almost uncontroverted, if the constitution gave the constitutional officer the power in terms to appoint his subordinates, as was the case in New York with regard to the superintendent of public works. In that case the court of appeals of New York was unanimous against the applicability of the civil service law (People *v.* Angle, 109 N. Y. 564), and an amendment of the constitution was necessary to make civil service rules applicable to that branch of the service.

An analysis made about ten years ago of statutes declared unconstitutional in a number of leading states showed that these resulting limitations furnished the ground of invalidity in about twenty per cent of the cases. While in itself the proportion may not seem excessive, it is all too large when it is considered that no valuable principle is generally involved in this class of cases. When constitutional questions turn on fundamental rights or policies, the judicial decision may not command universal approval, but there is at least the assurance that the statute appeared in the court in some essential respect objectionable. The resulting limitation on the other hand is generally a purely technical one, not within the contemplation of the framers of the constitution; more often than otherwise the result of an accidental turn of phrase, or due to the impracticability of properly qualifying the rules laid down in such a compendious document as the constitution.

In some cases, it is true, the resulting limitation represents what to the court appears to be an essential principle: the saving of executive or judicial independence from meddlesome and abusive legislation. Cases involving the contempt jurisdiction of courts furnish a striking illustration in point.[1]

[1] See also legislation regarding admission of attorneys to practice: *ex parte* Day, 181 Ill. 73.

When the practice of special legislation was common and the principle of equality less developed than at present, the apprehension of legislative intermeddling may have had some foundation in political tendencies or possibilities. To-day, when the danger of legislative impairment of the legitimate province of either judicial or executive action is extremely remote, it should be considered whether the doctrine of resulting limitations does not in its turn impair the legitimate province of legislation.

It certainly has this unfortunate consequence: Neither the executive nor the judiciary have any constitutional rule-making organs. The executive may formulate a rule for his action, but it is not binding on his successor nor even upon himself. If a court has inherent power to determine the qualification of attorneys and the supreme court is not vested with a constitutional power of superintendence over all other courts, what legal guaranty is there for uniformity of rule or policy in this respect either between supreme court and inferior courts, or even between the various courts of original jurisdiction, each of which has equal constitutional jurisdiction? If a reform is desirable in contempt procedure, how can it be brought about? The exercise even of constitutional powers ought to be subject to law—that is to say, uniform and orderly; but the constitution knows no law-making organ except itself and the legislature. Deny the validity of legislative regulation on the ground of the constitutional status of a function or power, and you proclaim that that function is amenable to no law except the voluntary restraint of the official who exercises it; the doctrine of resulting limitations becomes a doctrine of constitutional anarchy. Who, in view of this doctrine, can tell with certainty, whether or to what extent the administration of martial law, where it is claimed directly under the constitution, is a legitimate subject of legislation? If it is not, do we not recognize as exempt from legislation a dangerous power which can be and is regulated by statute in countries supposed to have less civil liberty than we have? Must this not create a sense of legal insecurity totally at variance with the spirit of constitutional government? It be-

hooves us at least to realize the far-reaching and alarming consequences of the doctrine of resulting limitations.

What is needed to deal effectually with the inconveniences of this doctrine of resulting limitations, is a new canon of construction. Would it be wise to formulate such a canon by constitutional enactment? There are plausible objections. Constitutions have not in the past attempted to control the judiciary in this respect, and the undertaking is one of considerable delicacy. On the other hand, the very difficulty of forcing the hand of the courts is a strong point in favor of the proposition. No mandatory formula could be devised which would permanently subjugate the essential freedom of judicial construction; the purpose and function of any constitutional canon of construction would merely be to enable the courts to break away from doctrines to which they consider themselves, perhaps reluctantly, bound by established precedents.

A similar problem has arisen in connection with statutory rules of practice and procedure which courts felt bound, by precedent, or by the supposed limitations of judicial power, to apply in a literal and technical spirit. To meet this difficulty, the New Jersey Practice Act of 1912 provides as follows:

> These rules shall be considered as general rules for the government of the courts and the conducting of causes and as the design of them is to facilitate business and advance justice they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

If such a provision is deemed appropriate with regard to a statutory code it would seem that a similar rule, much more conservatively framed, might be advantageously applied to a constitution which cannot speak with the particularity of a statute, and which is so much more difficult of amendment. In New Jersey the legislature set the judiciary free by declaring that the letter should not kill the spirit; a similar declaration on the part of the constitution-making power would set free not merely the judiciary but also the legislature.

The legitimate claims of legislative power have been unduly curtailed in two ways: by excessive implication of coördinate, independent and exclusive power in other departments, and by insufficient implication of legislative power by way of reasonable allowances tempering unintended consequences of the strict letter of the constitution. It should therefore be expressly recognized that presumably the constitution is intended to take care only of essentials, and that, subject to the effectual guarding of those essentials, the needs of government demand the fullest power of subsidiary regulation through statutory enactment.

To illustrate: If the constitution fixes the term of office, this should not necessarily exclude legislation for holding over (as expressly permitted by the Rhode Island constitution of 1842, art. 4, § 16), or for changing the time of election;[1] provided the change of time is not merely a contrivance for extending the term; nor should the extension of a term for the purpose of preventing a vacancy be regarded as a legislative appointment to office; nor should a constitutional appointing power be deemed inconsistent with legislation prescribing qualifications for eligibility to appointment. The executive power to execute the laws should not prevent legislative regulation of martial law. The vesting of jurisdiction in certain courts should not prevent the fullest legislative power to regulate procedure; even the power to punish for contempt should not be withdrawn entirely from legislative regulation. It is unnecessary further to multiply instances.

The phrasing of an appropriate canon of construction by the constitution is a matter of great difficulty, and there is perhaps no available formula to which exception cannot be taken in some respect. The main hope for an agreement must be found in the fact that, as pointed out before, the operation of any canon of construction will of necessity be enabling rather than mandatory, that courts will not be absolutely bound, but merely aided in adopting more liberal views of legislative power.

[1] See 163 Ind. 150; 71 N. E. 478; 177 Ind. 564; 98 N. E. 342, 1912.

The following is tentatively suggested as a possible clause:

The provisions of this constitution express fundamental principles and policies and shall be construed accordingly. The legislature may regulate the exercise of constitutional powers for the better carrying out of their purposes, and may, without violating the spirit of a provision, apply it with the necessary qualifications demanded by the practical requirements of government. Constitutional powers shall be exercised in subordination to the principles which they are intended to serve.

Resulting limitations can also be eliminated to a considerable extent by making constitutional provisions expressly subject to change by statute. Provisions to that effect now occur, either so that after a specified time the legislature may act,[1] or so that the constitutional provision is operative only until or in the absence of legislative action.[2] This practice is of course capable of indefinite extension, and may be used as a compromise in dealing with the tendency to overload unduly the constitution with detailed provisions. However, it would be impossible to differentiate on principle clauses that should or might be made amenable in this way; still less, of course, to formulate in abstract terms a classification of clauses for this purpose. If the expedient is to be resorted to, it will be necessary to consider carefully in detail to what provisions it is to be made applicable.

INHERENT LIMITATIONS

The inherent limitation is supposed to flow from the nature of the power itself. It is not expressed in the constitution; it is not imposed by the claims of coördinate powers, nor does it result from the operation of specific constitutional provisions; but it either indicates the bounds of state sovereignty, or expresses the essential integrity of legislative power as against impairment by the legislature itself. In the latter aspect, the inherent limitation practically means that beyond a certain

[1] See, *e. g.*, corporation article in the constitution of Oklahoma.

[2] See United States constitution, time of meeting of Congress.

point the legislature cannot surrender its power or bind its future action. Such inalienable freedom does not necessarily make for increased capacity, just as an infant who cannot legally bind himself finds himself unable to do business.

The problem of inherent limitations has in recent times been most discussed perhaps in connection with the delegation of powers of regulation to administrative authorities. The present tendency is to recognize the validity of such delegation to a very considerable extent. To what extent the legislature may or should justly go, is a question that only experience can solve. Expressly to sanction a power of delegation by constitutional provision without qualification, might throw open the doors too wide; to prescribe in detail modalities for the exercise of delegated power, might hamper unduly future developments. In view of the liberal attitude of the courts, no express recognition of the power seems to be called for, and on the whole it may be wiser to omit an express provision.

However, express provisions seem desirable to relax supposed inherent limitations in the following respects:

1. For the purpose of allowing a state-wide referendum.
2. For the purpose of better guarding the exercise of the police power.
3. For the purpose of securing greater uniformity of legislation within the state.
4. For the purpose of facilitating uniform action between the states.

1. *The State-wide Referendum*

There is judicial authority to the effect that the legislature may not make the taking effect of an act of state-wide operation to depend upon the result of a popular vote.[1] There are weighty reasons why the legislature should not lightly pass the responsibility for its measures on to the electorate, but there are also considerations on the other side. The constitution might permit the referendum by the legislature at least in certain cases or under certain conditions.

[1] Barto *v.* Himrod, 8 N. Y. 483.

It might also be worth while to consider whether, as a substitute for the initiative (or in addition thereto), the constitution should not permit a referendum to the people of a measure introduced by the governor or passed by one or both houses, and which has failed to become a law, upon the motion either of the governor or of one or both of the houses. In this way every measure having a respectable popular support would have a chance of being submitted to the people, with more responsible endorsement and after more consideration than initiative propositions often have.

2. *Action under the Police Power*

The prevailing doctrine is that no action of the legislature can bind the future exercise of the police power. It may be conceded that the power to protect health, safety or morals must not be bargained away; yet the doctrine has been carried to excess, and interests acquired in reliance upon the faith of legislative declarations have been allowed to be disappointed and sacrificed. It is not merely a question of the sound constitutional theory of vested rights, but a matter of wisdom and policy, that it should be possible in enacting legislation to give some assurance that people may act upon it with safety. There would probably be no disposition—desirable though it might be—to allow legislation to be enacted with a provision that for a limited number of years it shall not be altered to the detriment of vested interests, except under urgent requirements of safety. Less objection might however be felt to a constitutional provision permitting a legislative provision that if valuable rights or privileges are taken away in the exercise of inalienable legislative power, the question of compensation on equitable principles shall be referred to judicial or arbitral authority.

3. *Provision for Unity of Statute Law*

The practice of legislation might be considerably harmonized, and its quality improved incidentally, by the enactment of general statutes (comparable to the English "clauses acts") dealing exclusively with subsidiary matters of administration,

enforcement, operation or interpretation, which are now taken care of as part of each particular piece of legislation, these statutes to be incorporated by reference into any legislation to which they may be applicable. In this way alone uniform administrative principles can be secured.

Even after the enactment of such statutes it may happen that in preparing some particular bill provisions of the same subsidiary character are inserted, in disregard of the general act. If there is an express purpose to override the general provision, the legislative intent should of course prevail; often, however, it is as a case of mere inattention or ignorance of the fact that the matter is already provided for. If so, there results a needless and inadvertent diversity of laws where uniformity would be more in accord with good legislative policy or even with constitutional principles.

This situation might be remedied by a constitutional provision establishing as a rule of construction that if an act to which general statutory rules of an administrative or otherwise subsidiary character would in the absence of express provision be applicable contains special provisions which are susceptible of a construction at variance with those general rules, the special provisions shall in the absence of clear intent to the contrary be construed as subordinate to the general rule, or as directory so that the general rule may prevail.

4. *Provision for Interstate Uniformity*

Two ways are at present open to secure uniform legislation between several states: an act of Congress, and concurrent state legislation. The scope of congressional legislation is limited by the federal constitution, which is difficult to amend, and which lacks a provision similar to that found in the Australian constitution, permitting the common regulation by the national legislature for a number of states of any matter referred to it by these states. Concurrent action between the states is a slow and unsatisfactory process without any guaranties of permanence.

A state constitution could, however, aid concurrent action in at least two respects:

a. Legislative agreement. The federal constitution forbids the states to enter into agreements with each other without the consent of Congress. It follows from this that such agreements are possible provided the consent of Congress be obtained. Congress may probably give its consent in advance to specified kinds of agreements. At least this was done by act of March 1, 1911, whereby consent was given to any compact which states might enter into for the purpose of conserving forests and water supply. Why then should not several states make agreements for identical legislation? Because, it seems, the federal constitution presupposes some competent state authority to make the agreement, and does not undertake to create such authority. The contractual capacity of a state is vested in the legislature, but is undoubtedly limited to matters as to which a state under its constitution may bind itself by agreement. The legislative policy of the state does not belong to this class. There is at present no way by which a state can by agreement with another state bind itself to a certain course of legislation, or make a statute, adopted by agreement with another state, irrevocable. There is no reason, however, why this should not be possible under express constitutional authority. A constitutional provision authorizing agreements concerning legislation is therefore desirable. The power would have to be restricted in various particulars, especially as to time limits for such agreements, but the principle of the power is unobjectionable, and should at least be presented to a constitutional convention for consideration.

b. Joint commissions. The cause of uniform legislation would be greatly strengthened by the creation of offices or commissions common to a number of states, charged with the task of establishing technical or scientific standards for matters subject to statutory regulation. To a constantly growing extent modern legislation is concerned with matters in which effectual rules must be based upon conclusions reached after expert inquiry. A common bureau for the prosecution of such inquiries would have the advantage of a wider range of selection of competent men; its findings would be more reliable; there would be a saving of time and money; and uniformity of provisions would be brought about without special agreement.

There might, however, be a constitutional difficulty in making such conclusions available for state legislation. Conceding that powers of regulation may be delegated to commissions, may they be delegated to commissions not belonging exclusively to the state? Or to put it in another form, is it a proper exercise of administrative discretion to defer to the conclusions of persons not responsible to the state? It is to say the least uncertain how these questions would be answered.

The uncertainty can be removed by a simple enabling provision authorizing the legislature to join with other states in the creation of joint bureaus or commissions for the working out of technical standards, the standards thus worked out to be available as norms to be applied in the administration of state statutes, though subject to state control and alteration. A provision of this kind would perhaps have the incidental effect of encouraging the establishment of these agencies of uniformity.

5. *The Due-Process Clause*

It may be asked: if legislative powers are to be enlarged, why not also attempt to deal with the limitations that have arisen from a supposedly illiberal application of the guaranty of due process? A moment's reflection will show that we are here confronted with a totally different problem. The interpretation of the due-process clause involves the entire concept of the state and of state power; any attempt to control it by a comprehensive constitutional provision, short of entirely altering the scope of judicial power, must fail. In this matter enduring change is possible only by altered judicial views and convictions, although particular matters may perhaps be dealt with by specific enabling provisions, as in New York in the matter of workmen's compensation. The question here is not between strict and liberal, but between right and wrong construction. It would be impossible to find a formula adequate to the solution of the problem.

The suggestions made in this paper claim the merit of avoiding highly controversial ground, and of paving the way for great and needed reforms without destroying the benefits of judicial control.

SUMMARY

1. In addition to the specific questions to be dealt with by a constitutional convention, there is the general problem of molding the entire framework of the constitution in such a way as to make it most serviceable as the paramount law of the state.

2. In all states there has been a great increase in the number of provisions which are not fully operative without statutory legislation.

3. Every provision of the constitution, though intended to be enabling, operates to some extent as a limitation, enforced by the courts.

4. In so far as this is true, the people in making a constitution, instead of speaking directly, interpose between themselves and their will two organs instead of one.

5. The remedy lies in devising a structure of the constitution that will preserve the benefits of judicial control without hampering the work of legislation by unessential or unintended limitations.

6. For this purpose it will be necessary:

(a) To remove or qualify limitations that experience has proved to be of slight value or unenforceable.

(b) To attempt to secure superior methods of preparing and enacting legislation.

(c) To minimize the effect of limitations that are due to inadvertence and not to deliberate policy.

(d) To emancipate the legislature from supposedly inherent restraints placed upon it by a judicial theory of the exclusiveness, the inalienability and the non-delegability of constitutional powers.

7. The process of enacting laws should be improved by affording added facilities for executive aid in legislation, and by revising the present procedural requirements.

8. The chief organic defect of American methods of legislation is that the multiform structure of the legislature is not utilized for functional differentiation. While a change in that direction cannot be forced, the following measures would enlarge the share of the executive:

(a) A right to introduce bills, as now recognized with regard to general revenue bills in Alabama.

(b) An enlargement of the time for executive approval in order to afford better opportunity for the scrutiny of bills.

(c) A right of the governor to present with his veto amendments that may be voted on at once, likewise recognized in Alabama.

9. Procedural requirements should be revised for the purpose of making sure:

(a) That they serve an object of vital importance.

(b) That they do not unduly impede business.

(c) That they are not susceptible of evasion by purely formal compliance or by false journal entries.

(d) That they do not raise difficult questions of construction.

(e) That the fact of compliance or non-compliance can be readily ascertained by an inspection of the journal.

10. Requirements regarding form and style of bills (title, unity of subject matter, amendatory acts) have on the whole tended to eliminate undesirable practices in legislation; but this benefit has been largely offset by the large number of constitutional questions they have raised and by the needless prolixities which are induced by the fear of violating the requirement, if not by the requirement itself.

11. The benefits of both procedural and form requirements can be retained and their inconveniences minimized by forbidding the validity of statutes to be questioned by reason of the violation of either, after the expiration of a brief period to be fixed by the constitution. Any harm caused by the violation of these requirements is speedily cured by lapse of time.

12. In order to improve the quality of legislation the constitution should encourage expert coöperation in the drafting of statutes. With that end in view:

(a) It should be made possible to place drafting clerks under civil service rules; under present constitutions legislative employes cannot be brought under these rules.

(b) The right should be given to the governor or a stated proportion of the members of either house, to demand the suspension for a brief period of the proceedings on a bill in order

to obtain the opinion of officials familiar with the subject matter; the legislature to be free to act upon the opinion or not.

13. Powers of legislation are unduly curtailed by the doctrine of resulting limitations which operates either by giving literal effect to constitutional provisions expressed without sufficient allowance for necessary detail or qualification, or by treating executive or judicial powers as exclusive and independent of legislation. In either case salutary legislation may be rendered impossible, and in the latter case the power is amenable to no rule whatever, since neither the executive nor the judiciary has any inherent rule-making authority.

14. This situation may be remedied by formulating in the constitution a new canon of construction, which without attempting rigidly to bind the courts would enable them to adopt more liberal views of legislative power. The provision might perhaps be worded as follows:

> The provisions of this constitution express fundamental principles and policies and shall be construed accordingly. The legislature may regulate the exercise of constitutional powers for the better carrying out of their purposes, and may, without violating the spirit of a provision, apply it with the necessary qualifications demanded by the practical requirements of government. Constitutional powers shall be exercised in subordination to the principles which they are intended to serve.

15. Resulting limitations may also be diminished by making specified constitutional provisions expressly subject to change by statute.

16. The legislative power is further curtailed upon the plea of preserving it unimpaired and in full integrity. Beyond a certain point the legislature cannot surrender its power or bind its future action. An inalienable freedom in effect amounts to a reduction of disposing capacity.

17. The present tendency of the courts is to be liberal in allowing delegation of powers or regulation to administrative authorities. An express constitutional sanction of this power of delegation seems unnecessary, and it would be difficult at the present time to forecast possibly desirable qualifications.

18. Express constitutional provisions would be appropriate to relax supposed inherent limitations in the following respects:

(a) To allow a state-wide referendum.

(b) To guard better the exercise of the police power.

(c) To secure greater uniformity of legislation within the state.

(d) To facilitate uniform action between the states.

19. The power of the legislature to make the effect of a statute depend upon approval by popular vote being controverted, the constitution should permit the practice at least under specified conditions. Perhaps the power should also be vested in the governor or in either of the houses to demand a referendum on bills which have failed to become law in the regular course of legislation. The latter provision might prove acceptable as a substitute for the initiative.

20. A constitutional provision is needed and desirable to make it possible for the legislature in enacting police legislation to guarantee that if valuable rights or privileges are taken away in the exercise of inalienable legislative power, the question of compensation on equitable principles shall be referred to judicial or arbitral authority.

21. In order to harmonize the administration and enforcement of statutes, the usual clauses which are needed to make a statute operative should be consolidated or codified. To make these codes fully effectual, they should have appropriate constitutional recognition.

22. To promote uniformity of legislation between the states, the constitution should sanction concurrent legislation by way of agreement, subject to the approval of Congress.

23. For the same purpose the constitution should authorize appropriate legislation for the creation of joint bureaus or commissions to work out common standards for the states represented, to be applied to the administration of state statutes, subject to legislative control.

24. No attempt should be made to control by a comprehensive constitutional provision the application of the guaranty of due process of law.